IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION

FILED

September 16, 1998

Cecil W. Crowson
Appellate Court Clerk

DONALD F. WALTON,	)	
	)	No. 01C01-9707-CR-00273
APPELLANT,	)	
	)	Davidson County
v.	)	
	)	Honorable Seth Norman, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
APPELLEE.	)	

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OPINION FILED: _____

AFFIRMED

L. T. LAFFERTY, SPECIAL JUDGE

OPINION

On June 16, 1994, the petitioner, Donald F. Walton, pled guilty to murder second degree and especially aggravated robbery. The petitioner was sentenced to 25 years, Range I, for each offense. The sentences were to run consecutively for a total of 50 years. In November, 1994, petitioner filed a *pro se* petition for post-conviction relief. Counsel was appointed. An amended petition was filed alleging petitioner's attorney had told him he could make parole after serving approximately seven and one-half years in confinement, thus constituting ineffective assistance of counsel. After a hearing on the petition on October 4, 1995, the Davidson County Criminal Court denied the petition. This denial was appealed to this Court. On January 30, 1997, this Court reversed the trial court and remanded to the trial court to determine whether the petitioner had sufficiently satisfied the first prong requirement under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After such review, the trial court, again, denied the petition. The sole issue for our review is whether the evidence preponderates against the findings of the trial court. We affirm the hearing court.

GUILTY PLEA PROCEEDINGS

JUNE 16, 1994

On January 7, 1993, the petitioner and three companions agreed to rob the Las Palmas Restaurant in Nashville, Davidson County. Two co-defendants stole a car for the purpose of the robbery. The four defendants left the petitioner's apartment and proceeded to the restaurant. The petitioner was armed with a sawed-off shotgun. The other three possessed weapons. One co-defendant, Carey, went to the front of the restaurant and took approximately $500 in cash. When the waiter did not follow the orders of Carey, Carey shot him in the chest with a sawed-off shotgun. During this episode the police were summoned by a 911 call; upon their arrival, the four co-defendants fled.

Two co-defendants were arrested shortly, one being Carey. Carey confessed his

involvement and implicated the petitioner and a Brown. Subsequently, the petitioner was arrested and gave a statement to the police about his participation in the robbery of the restaurant. Also, the petitioner assisted the police in recovering certain evidence, including the pistol used by Brown. Ms. Newsome, the petitioner's girlfriend, would have testified that the petitioner, upon returning to the apartment, told her what happened in the restaurant.

POST-CONVICTION PROCEEDINGS

As alleged in the petitioner's amended petition, the petitioner contends his counsel advised the petitioner, in the presence of the petitioner's parents, that he could parole out on the first 25-year sentence after approximately seven and one-half years and remain on parole for the remainder of his full sentence, including the consecutive 25-year sentence. Further, counsel advised the petitioner and his parents he would receive life imprisonment if he failed to accept the plea bargain proposed by the State.

The petitioner testified that his privately retained attorney, Mr. Dale Quillen, discussed with him the types of sentences the State had recommended. The State was recommending 25 years on each count to run consecutively. As to the length of the sentence, his attorney told him he would do seven and one-half years; more specifically, "he told me I would only do seven years and five months on the first twenty-five, and parole out, and do the rest of my twenty-five year sentence on the second one on paper." The petitioner advised the trial court that was one of the reasons he accepted the plea bargain. The petitioner testified that on this advice he accepted the plea bargain. Further, the petitioner testified without that advice he would have taken his case to trial. Also, counsel guaranteed the petitioner that if he failed to accept this plea bargain he would get life. The petitioner testified his counsel had convinced his family that the petitioner would be out in seven years and five months.

In his testimony, the petitioner agreed his counsel went over with him the State's

proof showing how he was involved. In addition, his counsel discussed with the petitioner the petitioner's confessions, including copies of his co-defendants' confessions. The petitioner testified he was aware that two co-defendants had pled guilty and received life sentences. Also, the petitioner was aware that the third co-defendant, Joe Utley, who had not shot the victim, had proceeded to trial. This co-defendant was found guilty and received a life sentence and 25 years consecutively. The petitioner believed if he had gone to trial he would have been found not guilty, since he did not kill anyone. The petitioner denied that his counsel informed him of any contact his attorney had with the parole board.

The petitioner's father, Mr. Frank Walton, a Chicago Board of Education music teacher, advised the trial court he and his wife retained counsel, Mr. Quillen, for their son. Mr. Walton testified he met with defense counsel about five or six times and was present in the jail when defense counsel discussed the plea bargain with his son. Mr. Walton testified Mr. Quillen stated, "the sentence was fifty years. And he told him, I'm trying to remember, that if he went in and had good behavior, he could be out in possibly seven and a half years. With good time, they would give him two days for one, so." When asked if this was on the first sentence, Mr. Walton responded, "It was my understanding, the first sentence, because I think he said, like, if he went in and did good time, maybe in four and a half years." Mr. Walton testified the plea was totally unacceptable to his son, but he and his wife persuaded their son to accept it.

Mr. Walton agreed that Mr. Quillen had discussed thoroughly the ramifications of the felony murder rule, but not the State's proof in terms of his son's participation in the robbery. Mr. Walton was aware his son had given a confession, but his son told him he was coerced into doing the robbery. Mr. Walton urged his son to take the plea bargain, due to his complete confidence in Mr. Quillen. Mr. Walton stated, "He was my counselor. And I took his advice." Mr. Quillen advised Mr. Walton that if his son went to trial he would be found guilty, and Mr. Quillen was almost 100 percent certain of that. Mr. Walton testified Mr. Quillen had his wife come to Nashville to observe the trial of the co-defendant, Joe Utley, who was convicted. Mr. Walton agreed Mr. Quillen was correct.

The petitioner's mother, Mrs. Lavone Walton, a U. S. Postal Service employee, testified in her son's behalf. Mrs. Walton testified she was present during the plea bargain discussions between Mr. Quillen, her son, and her husband. When questioned as to what Mr. Quillen said regarding how the sentence would be served, Mrs. Walton responded:

> He instructed us that Donald was going to have fifty years. And that fifty years, thirty percent of it would be fifteen years. And fifteen years, he would serve seven and a half years of that sentence, and he would be paroled out on the first twenty-five years, which consists of seven and a half years. He would be out. That's the only reason why we accepted it. Because he didn't tell us that Donald was going to have to serve the whole fifteen years. This was not our understanding.

Mrs. Walton verified Mr. Quillen had her attend the trial of the co-defendant, Joe Utley. Apparently Mrs. Walton was not impressed with the State's proof, although Utley received a life sentence. Mrs. Walton understood the only evidence against her son was his confession. Mrs. Walton acknowledged she was aware, upon a retrial, her son could get life, but some inmates had told the defendant what he was serving, which was fifteen years, would be eighteen years if it was a life sentence.

Mr. Quillen testified that he has been a practicing attorney for 39 plus years in Nashville. Mr. Quillen acknowledged that he represented the petitioner and that the petitioner's parents participated in many discussions with him, including the plea bargain discussion resulting in the plea.

Mr. Quillen testified he has no recollection of explaining to the petitioner he would serve the first sentence in about seven and one-half years, parole out, and then remain on parole for the duration of the sentences.

Mr. Quillen testified he contacted the Department of Correction, or a representative of the Board of Paroles, and submitted to them a hypothetical situation. Mr. Quillen informed the petitioner of the information he had received with an admonition that rules change from time to time for various reasons. Mr. Quillen agreed that a representation of seven and one-half years would be incorrect, but there was no hope that the petitioner

would be released at that early date. To Mr. Quillen's best recollection, the Board's feedback was that from 11 to 15 years would be the petitioner's eligibility period. Mr. Quillen believed the petitioner understood the ramifications of the written petition to plead guilty.

Mr. Quillen acknowledged he talked to the detective who obtained the petitioner's confession and repeatedly attempted to get the State's representative to come off the 50 years, but to no avail. Based upon discovery, Mr. Quillen testified, "Certainly, I saw enough to convince me that there was absolutely no hope of winning." Mr. Quillen had Mrs. Walton attend the trial of Joe Utley.

In his testimony, Mr. Quillen denied that he informed the petitioner he would be released from prison in any specific period of time. Mr. Quillen advised both the petitioner and his parents of the information he received from the Board of Paroles. Mr. Quillen agreed the petitioner and his parents had difficulty accepting the felony murder theory, when their son had not killed anyone. Mr. Quillen recognized the petitioner had difficulty in grasping some of the legal propositions, so he had the petitioner undergo a competency examination. The petitioner was found competent to stand trial.

An interesting part of Mr. Quillen's testimony was the fact that another attorney had contacted him, since the petitioner's family had contacted this attorney to see if he could do a better job than Mr. Quillen. Mr. Quillen advised the family, "If this man can do anything better than what I'm getting, I will use a substantial part, or maybe all, of the money that's been paid to me to pay him to do it."

Based upon this testimony, the trial court entered an order on October 6, 1995 denying the petition. The trial court was convinced at the guilty plea proceedings the petitioner had many opportunities to ask any questions about the consequences of the 50-year plea. Further, the trial court found, pursuant to *Howell v. State,* 569 S.W.2d 428 (Tenn. 1978) and *Wilson v. State,* 899 S.W.2d 648, 653 (Tenn. Crim. App. 1994), per.

app. denied (Tenn. 1995), that improper advice relating to parole eligibility date was not incompetence of counsel. Upon remand concerning whether the petitioner had sufficiently satisfied the first prong requirement of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the trial court entered an order on June 2, 1997 denying the petition in that the petitioner did not receive erroneous advice.

STANDARD OF APPELLATE REVIEW

The trial court did not enter, in its opinion, a specific finding of facts, but did affirmatively find the petitioner did not receive erroneous advice (from counsel). Therefore, this Court must review the record for the purpose of determining whether the trial court's finding preponderates against the judgment entered by the trial court. This Court cannot reweigh or reevaluate the evidence, nor can we substitute our inferences for those drawn by the trial court. Also, the trial court makes the determination as to the credibility of the witnesses and what weight and value are to be assessed. The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the trier of fact. *State v. Sexton,* 917 S.W.2d 263 (Tenn. Crim. App. 1995); *Black v. State,* 794 S.W.2d 752, 755 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). It was the trial court's ultimate decision that defense counsel's advice was within the range of competence required by attorneys. Therefore, this Court must determine if the facts in this record support the trial court's conclusion. *Brooks v. State,* 756 S.W.2d 288 (Tenn. Crim. App.), per. app. denied (Tenn. 1988).

EFFECTIVE ASSISTANCE OF COUNSEL

Since the petitioner has alleged that his retained counsel rendered ineffective assistance of counsel, the burden is on the petitioner to establish (1) that counsel's performance was deficient, and (2) that, but for the deficiency, there is a reasonable probability that the result would have been different. *Strickland v. Washington,* 466 U. S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The same standard applies under Art. 1, §9 of the Tennessee Constitution. *State v. Melson,* 772 S.W.2d 417 (Tenn. 1989).

In *Baxter v. Rose,* 523 S.W.2d 930 (Tenn. 1975), the Supreme Court held that attorneys in Tennessee should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the Court stated that the range of competence was to be measured by the duties and criteria set forth in *Beasley v. United States,* 491 F.2d 687 (6th Cir. 1974) and *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973).

The petitioner urges this Court to find that the evidence preponderates against the trial court's decision. Thus, due to the erroneous advice given by defense counsel as to the effects of his guilty pleas, his pleas were not voluntary and knowing. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Teague v. State,* 772 S.W.2d 932 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989).

In its original opinion, the trial court was of the opinion that improper advice relating to a defendant's parole eligibility date could not form the basis of an ineffective assistance of counsel claim. This Court, in *Donald F. Walton v. State,* No. 01C01-9603-CR-00110, Davidson County (Tenn. Crim. App., Nashville, January 30, 1997), held that erroneous advice regarding parole that induces a defendant to forego his or her right to a jury trial can be used to establish a claim of ineffective assistance of counsel. If the petitioner can establish that his defense counsel did in fact erroneously advise him that he would become eligible for parole in seven and one-half years, he can satisfy the first prong requirement under *Strickland.*

Based on the testimony of the petitioner and his parents, the petitioner urges this Court to overrule the trial court's factual determination that Mr. Quillen did not give erroneous advice. Since the petitioner has the burden of proof proving the allegation in his petition by a preponderance of the evidence, *State v. Kerley,* 820 S.W.2d 753, 755 (Tenn. Crim. App. 1991), and applying the appropriate standard for appellate review, as heretofore set out, we cannot find the trial court's ultimate decision preponderates against the record. The trial court is affirmed.

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L. T. LAFFERTY, SPECIAL JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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THOMAS T. WOODALL, JUDGE